

## COMMENTS

### COMITY BE DAMNED: THE USE OF ANTISUIT INJUNCTIONS AGAINST THE COURTS OF A FOREIGN NATION

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#### INTRODUCTION

Kaepa, Inc., an American shoe manufacturing corporation, and Achilles Corporation, a Japanese distributor, entered into a distributorship agreement in April, 1993.<sup>1</sup> By July of 1994, the two companies had suffered a falling out, and Kaepa filed suit in Texas state court, alleging fraud and negligent misrepresentation by Achilles to induce Kaepa to enter the agreement, and breach of contract by Achilles.<sup>2</sup> After having the case removed to federal court, Achilles brought suit in its home country alleging "mirror-image" claims that Kaepa induced Achilles to enter into the contract through fraud, and that Kaepa had been the one who breached the contract.<sup>3</sup> Such closely related claims would doubtless have qualified as "compulsory" counterclaims under Federal Rule of Civil Procedure 13(a) had they been brought in a U.S. federal court.<sup>4</sup> Instead, however, the claims were brought in a

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<sup>†</sup> B.A. 1996, University of Pennsylvania; J.D. Candidate 1999, University of Pennsylvania. For setting me on the path to publication, I would initially like to mention my debt to Professor Emeritus A. Leo Levin. In addition, I wish to express my gratitude to the members of the University of Pennsylvania Law Review for their patience and understanding in preparing this piece. Yet, this work must truly be dedicated to my parents, Doy and Gloria Roberson, for without their support I would never have made it this far. Finally, in preparing this piece I have often been reminded of the words of William Cowper:

Knowledge is proud that he has learn'd so much;  
Wisdom is humble that he knows no more.

*The Task*, in *THE POETICAL WORKS OF WILLIAM COWPER*, bk. 6, ll. 96-97, at 221 (H.S. Milford ed., 4th ed. 1934).

<sup>1</sup> See *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 625-26 (5th Cir. 1996) (detailing the arrangement).

<sup>2</sup> See *id.* at 626.

<sup>3</sup> See *id.*

<sup>4</sup> FED. R. CIV. P. 13(a) (the compulsory counterclaim rule); see *Kaepa*, 76 F.3d at 628 n.14 (noting, but declining to resolve, whether Rule 13 should apply to claims brought in foreign courts).

court of a foreign sovereign presumably not subject to American rules of court procedure, setting the stage for yet another round in what has become a recurring debate amongst the federal courts: how to balance the "interests of comity" between courts with the "equitable factors favoring an injunction."<sup>5</sup>

The district court with jurisdiction over the *Kaepa* action eventually ruled that Rule 13(a) applied, even with respect to the courts of Japan, and entered an injunction against Achilles's further pursuit of its claims in Japan.<sup>6</sup> Calling the Japanese action "an absurd duplication of effort"<sup>7</sup> that would "result in unwarranted inconvenience, expense, and vexation," the Fifth Circuit Court of Appeals affirmed the injunction.<sup>8</sup> Thus, the courts of a foreign sovereign, Japan, were entirely deprived of the right to hear a case brought before them, as a result of another sovereign's, the United States's, rule of court procedure.

The instinct that there is something untoward about a federal court enjoining proceedings in the courts of another sovereign on the basis of nothing more than a domestic rule of procedure has led to a rather sharp divide between the circuit courts<sup>9</sup> and a variety of scholarly treatments<sup>10</sup> on what standards to apply before taking any action. This lack of uniformity in issuing injunctions calls into question the significance and applicability of the Federal Rules of Civil Procedure outside of the federal judicial system; implicates concerns for federalism and comity between the courts,<sup>11</sup> and raises

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<sup>5</sup> *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 34 (2d Cir. 1987) (concluding that comity outweighed the "equitable factors favoring an injunction").

<sup>6</sup> See *Kaepa*, 76 F.3d at 626 (noting the district court's grant of *Kaepa*'s motion to enjoin, and Achilles's subsequent appeal).

<sup>7</sup> *Id.* at 627 (quoting *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993)).

<sup>8</sup> *Id.*

<sup>9</sup> The split between the circuits is detailed *infra* Part II.C.

<sup>10</sup> A number of these authors argue that, especially in the international setting, actions in the courts of another sovereign should almost *never* be interfered with. See, e.g., Haig Najarjan, Note, *Granting Comity Its Due: A Proposal to Revive the Comity-Based Approach to Transnational Antisuit Injunctions*, 68 ST. JOHN'S L. REV. 961, 967 (1994) (emphasizing the importance of according "due deference to principles of international comity"). This Comment will restrict itself, however, to the contention that injunctions against the courts of another sovereign, whether it be a domestic state or a foreign nation, should be governed by similar policies of limited interference.

<sup>11</sup> "Comity" is defined as "[c]ourtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will." BLACK'S LAW DICTIONARY 267 (6th ed. 1990). "In general, [the] principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." *Id.*

the specter of one of the nation's oldest statutes, the Anti-Injunction Act of 1793 (the "AIA").<sup>12</sup>

At the domestic level, there are several separate standards for judging the appropriateness of issuing an antisuit injunction against another court. If the two courts are both part of the federal court system, the standard is relatively lax, since the two courts can be assumed to share a common interest in the efficient management of the federal system.<sup>13</sup> However, when the two courts are from different sovereign court systems—that is, when one is a federal court while the other is a state court—the issuance of antisuit injunctions is generally barred by the AIA unless one of three conditions is met.<sup>14</sup>

In the international setting, however, a controversy has erupted between the circuit courts over how to handle the issuance of antisuit injunctions by a federal court against proceedings in the courts of a foreign sovereign.<sup>15</sup> A number of circuits use a standard akin to that governing the use of these injunctions between the federal courts—requiring nothing more than duplication of the parties and issues to justify the issuance of an injunction.<sup>16</sup> A

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<sup>12</sup> Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 334 (1793) (codified as amended at 28 U.S.C. § 2283 (1994)). The original Act severely limited the availability of antisuit injunctions as a weapon to be used by federal courts against state courts. Since its last amendment in 1948, the Supreme Court has continued to refine the scope of the Act and the exceptions to it. *See, e.g.,* *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608-09 (1975) (holding that strict "standards must be met to justify federal intervention in a state [civil] judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies"); *Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (noting a strong judicial policy against federal interference with state criminal proceedings); *Dombrowski v. Pfister*, 380 U.S. 479, 484-85 (1965) (allowing a state's judicial system to retain jurisdiction despite the possibility of an error in the state trial court's holding on a constitutional issue).

<sup>13</sup> *See Adam v. Jacobs*, 950 F.2d 89, 92-93 (2d Cir. 1991) (stating that between two federal courts, "the first suit should have priority," and all that is required to justify the issuance by the first court of an antisuit injunction is a duplication of parties and issues). In these situations, Rule 13(a)'s purpose of promoting efficiency through the elimination of duplicative litigation is routinely cited to justify the issuance of an injunction. *See* 6 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1409, at 46 (2d ed. 1990) ("The reason for compelling the litigant to interpose compulsory counterclaims is to enable the court to settle all related claims in one action, thereby avoiding a wasteful multiplicity of litigation . . ."). Conflicts such as these, however, can often be avoided in the federal courts by asking the court in the subsequent suit to either stay its proceedings or transfer the case pursuant to 28 U.S.C. § 1404(a).

<sup>14</sup> Briefly, the three conditions are: (1) as expressly authorized by Act of Congress, (2) where necessary in aid of a court's jurisdiction, and (3) to protect or effectuate a court's judgments. *See* 28 U.S.C. § 2283.

<sup>15</sup> For a description of the division between the circuits, *see infra* notes 16-17 and accompanying text.

<sup>16</sup> Circuits utilizing this standard are the First, Fifth, Seventh, and Ninth. *See, e.g.,* *Alendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 430 (7th Cir. 1993) (holding that there is a presumption in federal court against "abstain[ing] . . . in favor of a parallel litigation

second set of circuits seems to treat the international situation more like an injunction by a federal court against a state court, allowing their issuance only when necessary to protect the forum's jurisdiction or to prevent evasion of the forum's important public policies.<sup>17</sup>

This Comment will argue that the use of antisuit injunctions in the international setting closely resembles their use in the federal/state context, and therefore that the same concerns that motivated the passage of the AIA to govern injunctions between federal and state courts should dictate that a similar rule govern in the international context.<sup>18</sup>

Part I will examine the historical restrictions on the use of the antisuit injunction—the most invasive enforcement mechanism available for use by a U.S. federal court against a court of another sovereign. This Part also contains an introduction to the AIA, which was first passed in 1793 to drastically limit the use of precisely these types of injunctions by the federal courts against the state courts.

Part II will introduce the modern practice of issuing antisuit injunctions against foreign courts and will detail the rather dramatic split between the circuits on this issue. Part II will conclude by examining the various tests devised by the different circuit courts and the theories that support them.

Part III will merge the historical analyses in Parts I.A and II to develop a proposed solution to the dilemma of determining the appropriate circumstances under which to issue an antisuit injunction against the courts of a foreign sovereign. This Part will summarize how the courts and commentators have dealt with the issue, and will then engage in a brief analysis of some of the proposed solutions to the problem. Next, it will import the

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pending in another court"); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855-56 (9th Cir. 1981) (same); *In re Unterweser Reederei*, 428 F.2d 888, 896 (5th Cir. 1970) (holding that the district court's decision that "allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship'" was within its discretion), *vacated on other grounds sub nom.* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578-79 (1st Cir. 1969) ("[C]omity . . . must give way . . . in limited circumstances when relitigation would cover exactly the same points."). For a more detailed discussion of the standard followed by these courts, see the discussion *infra* Part II.C.

<sup>17</sup> The second set of circuits includes the Second, Third, Sixth, and D.C. Circuits. See, e.g., *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354-55 (6th Cir. 1992) (emphasizing the need for more than just parallel proceedings to issue an injunction); *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1208-09 (D.C. Cir. 1989) (articulating a stringent standard for granting an injunction); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (same); *Compagnie des Bauxites de Guinée v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981) (same), *aff'd on other grounds*, 456 U.S. 694 (1982). This standard is also explained further in Part II.C *infra*.

<sup>18</sup> Thus, this Comment agrees in principle with the approach taken by the Second, Third, Sixth and D.C. Circuits, although I find the standard enunciated by this group of circuits to be too open to uncertainty.

analysis of the AIA from Part I.B to argue that the same concerns which drove the enactment of the AIA should educate the debate over the international use of antisuit injunctions. Finally, based upon this analysis, this Comment will propose a solution to the challenges posed by the international use of antisuit injunctions.

## I. THE HISTORY AND USES OF ANTISUIT INJUNCTIONS

### A. *The Early History*

"Forasmuch as yourselves, My Lords, drive me to that necessity for awarding our injunctions . . . you cannot hereafter any more justly blame me."<sup>19</sup>

Antisuit injunctions have been called "the most practically important class of injunctions."<sup>20</sup> Certainly, they are one of the most ancient and well-established forms of injunction. Some of this device's early ancestors can be traced back as far as Ancient Rome.<sup>21</sup> In addition, it bears a marked similarity to several of the writs granted by the early English monarchs.<sup>22</sup> It was not until the rise of the Court of Chancery in the latter part of the fourteenth century, however, that this type of injunction emerged in its modern form.<sup>23</sup>

The early common law courts of England "administered both law and equity."<sup>24</sup> With few legal precedents to rely on, these early courts were relatively free to tailor case-specific remedies.<sup>25</sup> By the thirteenth century, however, the common law courts began to lose their equitable nature and were becoming "rigid, technical, and overly formal."<sup>26</sup> This process of ossi-

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<sup>19</sup> 5 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 223-24 (Methuen & Co. 1937) (quoting Sir Thomas More, Lord Chancellor of England from 1529 to 1532).

<sup>20</sup> *Id.* at 335; see Michael David Schimek, Comment, *Anti-Suit and Anti-Anti-Suit Injunctions: A Proposed Texas Approach*, 45 BAYLOR L. REV. 499, 501 (1993) (noting the complete bar represented by an antisuit injunction because "[a] court issuing an anti-suit injunction effectively eliminates the [other] court's ability to hear the dispute and decide for itself whether to assert its jurisdiction").

<sup>21</sup> See David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 540-50 (1986) (detailing the varieties of Ancient Roman "interdicts").

<sup>22</sup> See *id.* (detailing the early English writs).

<sup>23</sup> See *id.* at 550, 555 (noting that "Chancery did not become an adjudicatory body until about 1380-1400," and that injunctions, including antisuit injunctions, "appeared in Chancery as early as the 1390's").

<sup>24</sup> *Id.* at 544 (explaining that law and equity had not yet diverged into two officially distinct types of remedies).

<sup>25</sup> See *id.* at 544-45 (explaining the flexibility available to these courts because of the limited number of judicial precedents and statutes).

<sup>26</sup> *Id.* at 551 (describing the gradual decline of equity and the correspondent rise of formalism in the common law courts).

fication set the stage for the rise of the Court of Chancery and the development of two separate, and often competing, English court systems.

Chancery endeavored to fill gaps in the substance of the common law and to provide the equitable relief that the common law courts were no longer willing to dispense.<sup>27</sup> To this end, Chancery began using injunctions,<sup>28</sup> which likely were modeled on the earlier tradition of writs issued by the Crown. Thus, equitable injunctions were issued to compensate for a wide variety of deficiencies in the common law.<sup>29</sup> Those injunctions that were issued merely to plug holes in the law created relatively little resistance throughout the English court system, and even allowed for cooperation between the common law judges and Chancery.<sup>30</sup> Far more controversial, however, was the injunction issued in the name of equity in order to halt or prevent the initiation of proceedings in a court of law.<sup>31</sup> These anti-suit injunctions constituted a direct challenge to the authority and legitimacy of the courts of law.<sup>32</sup>

Both the early Chancellors and modern academic commentators have stressed that "it is well understood that [an] injunction to stay proceedings in courts of law is not directed against the court itself, but against the parties to the proceeding."<sup>33</sup> Nevertheless, it is not surprising that the common law

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<sup>27</sup> See *id.* at 555 (discussing Chancery's role as compensating for the weaknesses of common law outcomes).

<sup>28</sup> See *id.* (discussing Chancery's use of the injunction to rectify "some defect in the common law system").

<sup>29</sup> See *id.* (explaining that injunctions were issued when common law had no appropriate remedy, was unable to carry out a remedy, or common law procedures were "misused").

<sup>30</sup> See 2 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 345 (Methuen & Co. Ltd. and Sweet & Maxwell Ltd. 4th ed. 1936) (noting that some judges even "advised parties, who had an equitable claim to relief, to apply to the chancellor" (footnote omitted)).

<sup>31</sup> See THOMAS C. SPELLING & JAMES HAMILTON LEWIS, A TREATISE ON THE LAW GOVERNING INJUNCTIONS 145 (1926) (noting that these injunctions "aroused the opposition of courts of common law jurisdiction from the earliest stages of [their] exercise").

<sup>32</sup> See 1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 461 (A.L. Goodhart & H. G. Hanbury eds., Methuen & Co. 7th ed. 1956) ("The courts of common law saw well enough that their supremacy was at stake."); D.M. KERLY, AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 107 (Cambridge, C.J. Clay & Sons 1890) (noting that the judges "feared that all suitors would be drawn into Chancery if the power of the Chancellor to override or intercept their decisions became established").

<sup>33</sup> SPELLING & LEWIS, *supra* note 31, at 184-85; see also Raack, *supra* note 21, at 568 (noting that the early Chancellors considered these injunctions justified because they "were addressed only to the party, not to the court of law or the judge" (footnote omitted)); Edward F. Sherman, *Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation*, 1995 BYU L. REV. 925, 927 (noting that the "threat of sanctions under the contempt power serves to enforce the injunction," restricting the parties' ability to pursue their case in the alternate forum (footnote omitted)).

judges did not look kindly on the issuance of injunctions of this nature.<sup>34</sup> The injunctions effectively deprived the judges of their power to hear cases<sup>35</sup> and set the stage for a centuries-long power struggle in England between the courts of law and the courts of equity.<sup>36</sup>

Despite the animosity that antisuit injunctions generated amongst the common law courts, there can be little doubt that their use was necessary to the development and efficacy of the Court of Chancery.<sup>37</sup> Without the ability to interfere in such a manner, it would have been impossible for Chancery to "carry out the jurisdiction it had assumed of controlling the law on the principles of equity and conscience."<sup>38</sup> Thus, much like modern courts, the early Court of Chancery had to balance the protection of important interests through antisuit injunctions with the concern for comity between the courts.

Chancery's response to this dilemma was to develop a variety of rules to regulate the issuance of this invasive type of injunction.<sup>39</sup> Well into the sixteenth century, the Chancellor had "almost unfettered discretion" to grant injunctions.<sup>40</sup> But beginning with the tenure of Chancellor Thomas More (1529 to 1532), Chancery made a conscious effort to limit its issuance of the most offensive types of injunctions.<sup>41</sup> Over the next two centuries, succes-

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<sup>34</sup> See 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1360, at 973 (5th ed. 1994) (characterizing this judicial opposition as "long and severe"); Raack, *supra* note 21, at 559 ("[T]he reaction . . . to the Chancellor's injunctions—at least to the injunctions that interfered with common law proceedings—was . . . one of some antagonism." (footnote omitted)).

<sup>35</sup> See Raack, *supra* note 21, at 559 ("When the Chancellor issued an injunction to a party to halt a proceeding at law, the judges were deprived of their power to hear the case.").

<sup>36</sup> See JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1360, at 2699-700 (3d ed. 1905) (noting the "long and severe opposition from the common law judges" to the idea that Chancery's equitable rulings could defeat a recovery at law).

<sup>37</sup> See *id.* ("Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction.").

<sup>38</sup> Raack, *supra* note 21, at 568 (quoting 1 G. SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 673-74 (1846)).

<sup>39</sup> See *id.* at 586-91 (discussing Francis Bacon's code of procedure and Lord Nottingham's manual of practice in Chancery, both of which limited the use of injunctions as instruments of delay).

<sup>40</sup> *Id.* at 570.

<sup>41</sup> See 5 HOLDSWORTH, *supra* note 19, at 223 ("[More] made it a habit never to grant a subpoena till he was satisfied that the plaintiff had some real ground of complaint." (footnote omitted)); Raack, *supra* note 21, at 571 (noting that More's "probity" and "scrupulousness" in issuing injunctions helped to dispel some of the hostility between Chancery and the common law judges).

sive Chancellors continued to add to the requirements necessary for an anti-suit injunction to be issued.<sup>42</sup>

By the time of the American Revolution, the antisuit injunction was, if not a disfavored device, a device used with circumspection.<sup>43</sup> Thus, it is not surprising that one of the first statutes passed in the early history of the United States was a restriction on the use of antisuit injunctions by the federal courts.<sup>44</sup>

### B. *The Anti-Injunction Act*

The relation of . . . the Courts of the United States to . . . the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and can not be disposed of by a summary statement that justice requires me to cut red tape and to intervene.<sup>45</sup>

The hundreds of years of strife in England over the proper application of antisuit injunctions could not have gone unnoticed by the early American statesmen. One of the consequences of the new nation's experiment with federalism was the creation of a dual system of sovereignty.<sup>46</sup> The resulting concurrent jurisdiction between the separate federal and state court systems resembled the dual court system in England and implicated concerns about the efficiency of such a system.<sup>47</sup> Although the new state and federal courts had more clearly delineated spheres of influence than had the Court of Chancery and the English common law courts,<sup>48</sup> the potential for conflict

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<sup>42</sup> See Raack, *supra* note 21, at 571-73, 586-91 (describing the development of procedures to ensure that a party seeking an injunction had some real ground of complaint, to confirm the truth of the allegations made, and to define the breadth of the Chancellor's discretion through citation to former decisions).

<sup>43</sup> See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 96-100 (1923) (recounting the heated debate in Congress over the Federal Judiciary Act of 1789 and its proposition that suits in equity would not be sustained when a remedy could be had by law); cf. JOURNAL OF WILLIAM MACLAY 92-94, 101-06 (New York, D. Appleton & Co. 1890) (noting the evidence of widespread hostility to Chancery practices during the debates to the Judiciary Act of 1789).

<sup>44</sup> See Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 334, 334-35 (1793) (stating that "no writ of injunction [shall] be granted to stay proceedings in any court of a state").

<sup>45</sup> 5 THE SACCO-VANZETTI CASE 5516 (Paul P. Appel 1969) (1928) (quoting a memorandum written by Justice Holmes).

<sup>46</sup> See *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (noting "the Framers' decision to authorize, and Congress' [sic] decision to implement, a dual system of federal and state courts").

<sup>47</sup> See SPELLING & LEWIS, *supra* note 31, at 21 (describing how the federal system is independent of the state court system in that "they coexist in the same territorial space, [but] they . . . have no common superior").

<sup>48</sup> See U.S. CONST. art. III, § 2 (delineating the scope of the jurisdiction of the federal courts).



between the two systems still existed.<sup>49</sup> In 1793, Congress enacted what has come to be known as the Anti-Injunction Act in an attempt to help prevent any such conflict from developing between the courts in the United States.<sup>50</sup>

In its original form, the AIA constituted a simple, one-line ban on *all* antisuit injunctions issued by a federal court against a pending state court action by stating that no "writ of injunction [shall] be granted to stay proceedings in any court of a state."<sup>51</sup> Thus, from the earliest days of the Republic, rules governing antisuit injunctions have been statutorily prescribed in the United States. For the first century of its existence, however, the federal courts largely ignored this provision and "applied the Act of 1793 as a matter of course," rather than explicitly relying upon it for authority.<sup>52</sup>

It was not until the 1874 codification of federal laws into the Revised Statutes that the AIA was dusted off to become an important factor in the

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<sup>49</sup> For instance, in many cases, state and federal courts have overlapping jurisdiction, allowing litigants a choice of forum. This is particularly problematic in the context of in rem cases where both courts cannot effectively control the same piece of property. *See, e.g.,* *Kline v. Burke Constr. Co.*, 260 U.S. 226, 235 (1922) ("The rank and authority of the [federal and state] courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict.").

<sup>50</sup> Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 334 (1793). Although the legislative history of the AIA is relatively sparse, former Attorney General Edmund Randolph recognized the potential for problems similar to those experienced in England in a prominent report considered by the House before the AIA passage. *See* 1 AMERICAN STATE PAPERS, No. 17. These papers note that the proposed AIA would:

debar the district court from interfering with the judgements at law in the State courts . . . . It is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common law side of the question into the State courts, and the equity side into the federal courts.

*Id.* at 34. Since its passage, the Supreme Court has repeatedly recognized as the AIA's purpose the avoidance of conflict between the state and federal courts. *See, e.g.,* *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 135 (1941) ("The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process."); *Taylor v. Carryl*, 61 U.S. (20 How.) 583, 597 (1857) ("The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision.").

<sup>51</sup> Act of Mar. 2, 1793, § 5, 1 Stat. at 334. *See* 28 U.S.C. § 2283 (1994) for the AIA as currently amended.

<sup>52</sup> *Toucey*, 314 U.S. at 134 & n.5 (citing a number of early cases which, without mentioning the AIA, nevertheless held that federal courts did not have the power to interfere with state court proceedings); *see also* 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 121 [App.100] (3d ed. 1998) (noting that the "federal courts almost completely ignored the anti-injunction provision" until the 1874 codification of federal laws into the Revised Statutes).

American legal system.<sup>53</sup> The 1874 Congress significantly refined the earlier AIA, specifically limiting the power of federal courts to enjoin state proceedings while simultaneously including a statutory exception for bankruptcy cases to the AIA's otherwise blanket ban.<sup>54</sup>

The statute remained unchanged until 1948, when it was amended to reflect its current language: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."<sup>55</sup>

Because the scope of these three exceptions is critical to determining when a court's jurisdiction is appropriately enforced through an antisuit injunction, a brief look at how courts have interpreted each of the exceptions is warranted.

### 1. The First Exception: "By Act of Congress"

The first exception, "as expressly authorized by Act of Congress,"<sup>56</sup> is the descendant of the earlier statutory exception: "[E]xcept in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."<sup>57</sup> In the years between 1874 and the AIA's final amendment in 1948, the Supreme Court came to recognize that other statutes might also require federal courts to permit injunctions of state court proceedings.<sup>58</sup> Thus, prior to the 1948 amendment, the Supreme Court developed a number of individual judicially-created exceptions to the AIA based on a variety of statutes.<sup>59</sup> These exceptions varied from broad allowances for bankruptcy

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<sup>53</sup> See 17 MOORE ET AL., *supra* note 52, at § 121 [App.100] (discussing the role that the codified anti-injunction provision played in "prevent[ing] needless friction between the state and federal courts" in a dual court system).

<sup>54</sup> See Rev. Stat. of 1874, ch. 12, § 720, 18 Stat. 134, 137 (1874) ("The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.").

<sup>55</sup> Act of June 25, 1948, ch. 155, § 2283, 62 Stat. 869, 968 (1948) (codified at 28 U.S.C. § 2283 (1994)).

<sup>56</sup> *Id.*

<sup>57</sup> Rev. Stat. of 1874, ch. 12, § 720, 18 Stat. at 137.

<sup>58</sup> See *Mitchum v. Foster*, 407 U.S. 225, 233-34 (1972) (explaining that the Court "recognized that exceptions must be made to [the AIA's] blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope"); see also 17 MOORE ET AL., *supra* note 52, §121.06(1) ("Over time, the Supreme Court recognized that to give intended effect to other federal statutes, courts needed to construe those statutes to permit injunction of state court proceedings." (footnote omitted)).

<sup>59</sup> See *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132-34 (1941) (detailing the various exceptions recognized by the Court in 1941, seven years before the 1948 amendment to the AIA). These exceptions included: the Removal Acts of Sept. 24, 1789, ch. 20, § 12, 1

proceedings, the removal of actions, and interpleader, to relatively narrow exceptions for limiting shipowners' liability.<sup>60</sup> Rather than codifying all of these exceptions, Congress instead chose to insert the blanket language, "as expressly authorized by Act of Congress," in the 1948 Act.<sup>61</sup> This general language has left the question of exactly which statutes fall under this exception as a matter of some debate between the courts.<sup>62</sup>

## 2. The Second Exception: "Where Necessary in Aid of Its Jurisdiction"

The second exception to the AIA's prohibition of federal injunctions against state courts arises "where necessary in aid of [a federal court's] jurisdiction."<sup>63</sup> In practice, this exception is invoked almost exclusively for in rem cases in which the court's physical possession of the property involved is critical to the court's ability to proceed with the cause and to grant the relief sought.<sup>64</sup> A simultaneous state court in rem action is particularly problematic because the two separate courts cannot both have control over the piece of property in question, the disposition of which is critical to the

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Stat. 73, 79, providing for the removal of actions to another court; Act of Mar. 3, 1851, ch. 43, 9 Stat. 635, limiting the liability of shipowners; The Interpleader Act of May 8, 1926, ch. 273, 44 Stat. 416, giving the district court hearing the interpleader action the power to enjoin parallel actions; and the Frazier-Lemke Act, ch. 204, § 75, 47 Stat. 1473 (1933), making petitioners under this Act subject to the exclusive jurisdiction of the federal court. See *Toucey*, 314 U.S. at 132-34. In so doing, the *Toucey* Court noted that "the language of the Act of 1793 was unqualified," and that Congress had made only a "few withdrawals from this sweeping prohibition" in the 150 years after it was enacted. *Id.* at 132.

<sup>60</sup> See *id.* at 132-34 (discussing these exceptions). The interpleader exception, for example, stemmed from statutory language which gave district courts explicit power to enjoin actions instituted by claimants which threatened the interpleader hearing. See The Interpleader Act of May 8, 1926, ch. 273, § 2, 44 Stat. 416, 416 ("Notwithstanding any provision of the Judicial Code to the contrary, said [district] court shall have power to . . . issue an order of injunction against each [claimant], enjoining them from instituting or prosecuting any suit or proceeding in any State court . . .").

<sup>61</sup> 28 U.S.C. § 2283.

<sup>62</sup> See 17 MOORE ET AL., *supra* note 52, § 121.06(1) (noting that both the Supreme Court and the lower federal courts are divided as to which statutes fall within the exception); see, e.g., *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 640 (1977) (5-4 decision) (splitting the Court on the issue of whether the Clayton Act qualified under the AIA's first exception); *Mitchum*, 407 U.S. at 225 (holding that 42 U.S.C. § 1983 fell within the AIA's first exception).

<sup>63</sup> 28 U.S.C. § 2283.

<sup>64</sup> See *Gunderson v. ADM Investor Servs., Inc.*, 976 F. Supp. 818, 823 (N.D. Iowa 1997) ("Thus, where the federal court's jurisdiction is in rem and the state court action may effectively deprive the federal court of the opportunity to adjudicate as to the res, the exception for necessity 'in aid of jurisdiction' may be appropriate." (citation omitted)); 17 MOORE ET AL., *supra* note 52, § 121.07(2)(d)(i) (noting that the in rem exception is well-settled and that "[f]ederal courts continue to find the narrow *res* exception included within the Anti-Injunction Act's [second] exception").

resolution of an *in rem* case.<sup>65</sup> As a rule, in *personam* actions will not qualify under this exception.<sup>66</sup> "When two sovereigns have concurrent *in personam* jurisdiction one court will ordinarily not interfere with or try to restrain proceedings before the other."<sup>67</sup>

### 3. The Third Exception: "To Protect or Effectuate Their Judgments"

The third exception to the AIA is known as the "relitigation exception."<sup>68</sup> This exception is "founded in the well-recognized concepts of *res judicata* and collateral estoppel,"<sup>69</sup> and it applies only to situations in which federal forum action has already been completed.<sup>70</sup> Under such circumstances, this exception may allow the federal court to enjoin a subsequent state action which threatens to overturn its decision.<sup>71</sup> Thus, in cases in which either of these doctrines would normally preclude subsequent litigation, the AIA allows federal courts to protect their decisions by enforcing these doctrines against state courts.<sup>72</sup> The relitigation exception, however,

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<sup>65</sup> See *Kline v. Burke Constr. Co.*, 260 U.S. 226, 235 (1922) (explaining that allowing two courts to have control over the same property at the same time would lead to distasteful conflict).

<sup>66</sup> See *id.* at 230 (vacating an injunction in a case involving contractual obligations rather than an *in rem* action, and stating that "[t]he rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded" (citations omitted)); Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 BYU L. REV. 289, 302 (noting that "[i]n spite of developments in other areas of procedural law exposing the artificiality of the '*in rem/in personam*' distinction, the . . . courts still struggle to make sense of the distinction for purposes of [the second] exception to the Anti-Injunction Act" (footnotes omitted)).

<sup>67</sup> *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (citations omitted).

<sup>68</sup> *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988).

<sup>69</sup> *Id.*

<sup>70</sup> See *id.* at 148 ("[A]n essential prerequisite for applying the ['protect or effectuate'] exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court."); see also 17 MOORE ET AL., *supra* note 52, § 121.08 (noting that the relitigation exception only applies after an action has been fully adjudicated).

<sup>71</sup> See *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970) ("[S]ome federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."). The Supreme Court has ruled, however, that the Full Faith and Credit Clause dictates that the injunction must be issued against the state court before the state court has ruled on the *res judicata* effect of the earlier federal decision. See *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986) (attempting to reconcile the AIA with the Full Faith and Credit Clause).

<sup>72</sup> See *Chick Kam Choo*, 486 U.S. at 150-51 (upholding the district court's injunction of the state courts from considering the petitioner's claim).

like the doctrines of *res judicata* and collateral estoppel upon which it is based, has no application in a situation involving concurrent actions.<sup>73</sup>

## II. THE USE OF ANTISUIT INJUNCTIONS AGAINST FOREIGN COURTS

### A. *Domestic Versus International Use of Antisuit Injunctions*

There is no international AIA to bar domestic courts from issuing anti-suit injunctions against foreign courts. An anti-suit injunction in this setting nevertheless implicates concerns of international comity. These concerns would seem to dictate that such injunctions rarely should be issued.<sup>74</sup> The dilemmas posed by compelling respect for a court's proceedings through the issuance of an injunction are only compounded when the second action is brought in a court of a foreign judicial system. It can be argued that all nations, including the United States, have a vested interest in the unimpaired functioning of their respective judicial systems. This Comment argues that, except in rare circumstances, this interest should outweigh the interest of any foreign nation in interfering with another nation's judicial system.

### B. *The Importance of Comity*

"[C]omity is to be preferred to combat."<sup>75</sup>

"Comity" is a critical, yet poorly defined, concept regulating relations between courts. It has variously been defined as "good neighbourliness, common courtesy and mutual respect,"<sup>76</sup> as "friendly dealing[s] between nations at peace,"<sup>77</sup> and as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation."<sup>78</sup>

When one federal court attempts to deny jurisdiction to another federal court via an anti-suit injunction, concerns regarding comity are implicated.<sup>79</sup>

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<sup>73</sup> See, e.g., *Santopadre v. Pelican Homestead & Sav. Ass'n*, 937 F.2d 268, 273 (5th Cir. 1991) ("The exception applies . . . only if the parties to the original action actually disputed the issue and the trier of fact actually resolved it." (citations omitted)).

<sup>74</sup> See *infra* Part II.B (discussing the role of comity in anti-suit injunction suits).

<sup>75</sup> *Hayes Indus. v. Caribbean Sales Assocs., Inc.*, 387 F.2d 498, 502 (1st Cir. 1968).

<sup>76</sup> *British Airways Bd. v. Laker Airways Ltd.*, [1983] 3 All E.R. 375, 397 (C.A.) ("Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.").

<sup>77</sup> *Hilton v. Guyot*, 159 U.S. 113, 162 (1895) (defining comity in the international setting).

<sup>78</sup> Laura M. Salava, *Balancing Comity with Antisuit Injunctions: Considerations Beyond Jurisdiction*, 20 J. LEGIS. 267, 267 (1994) (citing *Hilton*, 159 U.S. at 163-64).

<sup>79</sup> See Edward F. Sherman, *Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation*, 1995 BYU L. REV. 925, 927

The comity concerns inevitably raised when enjoining the proceedings of another court are further amplified when the court is part of another sovereign entity's judicial system. Whether these concerns are compelling enough to justify not issuing an injunction depends upon the relative importance assigned to comity.

For some courts, the concept of comity seems to have little value unless their decisions to issue injunctions will actually spawn an international incident.<sup>80</sup> Others, however, understand that the reciprocity inherent in comity means that freely enjoining foreign actions will likely result in a response in kind from foreign nations.<sup>81</sup>

### C. *The Circuit Split*

The federal circuits have split dramatically on what standard to apply with respect to the issuance of antisuit injunctions in the international setting.<sup>82</sup> The First, Fifth, Seventh, and Ninth Circuits apply a very lax standard in determining the availability of antisuit injunctions against foreign courts.<sup>83</sup> These circuits have determined that the mere duplication of parties

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("When a federal court enjoins prosecution of a suit in another federal court, principles of comity require that courts of coordinate jurisdiction exercise 'forbearance' by 'avoiding interference with the process of each other.'" (quoting *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922))).

<sup>80</sup> See *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996) (noting that the issuance of the antisuit injunction in the present controversy did not by itself threaten relations between the United States and Japan).

<sup>81</sup> See *Schimek*, *supra* note 20, at 505 ("If domestic courts fail to follow comity and issue anti-suit injunctions, foreign courts will likely respond in a similar manner in the future."); see also, e.g., *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 916-20 (1984) (detailing the long and bitter court battle between the litigants involving antisuit injunctions used by both U.S. and British courts); *Amchem Prods. Inc. v. Workers' Compensation Bd.*, 75 D.L.R. 4th 1, 7 (B.C. Ct. App. 1990) (determining that parallel proceedings in Texas amounted to "oppression"), *overruled by* 102 D.L.R. 4th 96 (Can. 1993); *Kornberg v. Kornberg*, 70 D.L.R. 4th 554, 559 (Man. Ct. Q.B. 1990) (issuing an antisuit injunction against a Minnesota court in a divorce proceeding).

<sup>82</sup> See *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1353-54 (6th Cir. 1992) (describing the various standards used to determine whether a foreign antisuit injunction should be granted and the circuits that adhere to them); *Salava*, *supra* note 78, at 268-69 (describing the differences in opinion among the circuits about the likely effect of using an antisuit injunction against a foreign tribunal). For a spirited debate on the issue, see *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996), in which Judge Weiner, reflecting the majority's support of the more relaxed Fifth Circuit standard, *see id.* at 627, and Judge Garza, arguing for more deference to comity, *see id.* at 629-31, vigorously defend their respective positions.

<sup>83</sup> See *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 433 (7th Cir. 1993) (holding that comity considerations would not prevent a federal court, "even under the strict cases," from issuing antisuit injunctions when the inability to plead *res judicata* could deprive the requesting party of the benefit of a judgment); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981) (affirming the district court's consideration of the relevant factors, including the "convenience" to the parties involved, the "ef-

and issues in both suits is enough to warrant the issuance of an antisuit injunction.<sup>84</sup>

In *Seattle Totems Hockey Club, Inc. v. National Hockey League*, the Ninth Circuit Court of Appeals summarized the reasons these circuits believe that any duplicative foreign litigation is properly enjoined.<sup>85</sup> The court argued that such duplicative litigation may be detrimental for a number of reasons. For example, it may frustrate a policy of the forum issuing the injunction, be vexatious or oppressive, threaten the issuing court's in rem or quasi in rem jurisdiction, or prejudice other equitable considerations.<sup>86</sup>

In contrast, the Second, Third, Sixth, and D.C. Circuits show considerably more deference to international comity. In these circuits, foreign antisuit injunctions will only be issued in two situations: first, to protect the forum's jurisdiction, and second, to prevent evasion of the forum's important public policies.<sup>87</sup>

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ficient administration of justice," and the potential prejudice to the parties in granting an antisuit injunction); *In re Unterweser Reederei*, 428 F.2d 888, 895 (5th Cir. 1970), *vacated sub nom.* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (holding that "it was proper for the district court to restrain Unterweser from proceeding in any other court"). *But see Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578-79 (1st Cir. 1969) (vacating an injunction and holding that, "[a]lthough there are times when [principles of] comity must . . . give way," the exception did not apply to the case at hand in which the matter of the foreign suit concerned a separate right).

<sup>84</sup> See Salava, *supra* note 78, at 268 (describing the lax standard applied by this group of circuits).

<sup>85</sup> See 652 F.2d at 854 (arguing for the "overriding interest [of the federal courts] in applying their own rules of procedure").

<sup>86</sup> See *id.* at 855 (listing several circumstances that would justify enjoining foreign litigation).

<sup>87</sup> See *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355-58 (6th Cir. 1992) (noting that an injunction will only be appropriate to protect a court's jurisdiction or to prevent a party from evading the forum's policies by litigating in a foreign jurisdiction); *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1212-14 (D.C. Cir. 1989) (noting that antisuit injunctions may be granted to protect the court's jurisdiction, but finding that such protection was not necessary in the present action); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36-37 (2d Cir. 1987) (noting that antisuit injunctions are proper when protecting the court's jurisdiction or protecting important public policies, but finding that the district court abused its discretion in granting an injunction in this case); *Compagnie des Bauxites de Guinée v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1982) (vacating the district court's order enjoining the defendants from proceeding in England's High Court of Justice and holding that "duplication of issues and the [defendant's] delay in filing the London action . . . alone did not justify the breach of comity among the courts of separate sovereignties" (quoting *Canadian Filters*, 412 F.2d at 578)).

The first of these two conditions, "to protect the forum's jurisdiction," is substantially similar to the second exception to the AIA, "where necessary in aid of its jurisdiction." 28 U.S.C. § 2283. The second condition, "to prevent evasion of the forum's important public policies," is not as well defined. It is apparent, though, that a mere interest in judicial economy will not suffice to satisfy this standard. See *Gau Shan*, 956 F.2d at 1357 (rejecting the

The two standards employed by the different circuit courts each appear to have their own drawbacks. Based upon their own interpretations of the relatively nebulous concept of comity, the two groups of circuits seem to have created standards which are either too lax (in the case of the First, Fifth, Seventh, and Ninth Circuits), or too strict (in the case of the Second, Third, Sixth, and D.C. Circuits).<sup>88</sup>

### 1. The "Duplication of Parties and Issues" Standard

"We decline, however, to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action."<sup>89</sup>

The lax standard followed by the First, Fifth, Seventh, and Ninth Circuits is remarkable in the utter lack of respect it affords the courts of foreign sovereigns. By issuing antisuit injunctions upon the mere showing of duplication of parties and issues, this standard makes it easier to grant antisuit injunctions internationally than at any level of domestic court interaction.<sup>90</sup> In general, at the domestic level, there is a presumption that parallel actions

plaintiff's argument that the interest in a "just, speedy, and inexpensive" trial was an important public policy (quoting FED. R. CIV. P. 1)).

<sup>88</sup> Compare *Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (noting that although comity may be one factor in granting or denying equitable relief, it "is entitled to no fixed weight in that consideration," and suggesting that evidence of the importance of comity can best be shown by a concrete and persuasive demonstration that a particular injunction would threaten foreign relations), with *Gau Shan*, 956 F.2d at 1354-55 (arguing that comity is critical for developing a stable international marketplace, and that disrespect for this concept will negatively affect "cooperation and reciprocity between courts of different nations" and lead foreign courts to "reciprocate such disrespect").

<sup>89</sup> *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996) (displaying the rather dim view of the importance of international comity taken by the Fifth Circuit).

<sup>90</sup> Federal versus state antisuit injunctions are governed by the Anti-Injunction Act, 28 U.S.C. § 2283. State attempts to enjoin federal proceedings have been held illegal by the Supreme Court. See *Donovan v. City of Dallas*, 377 U.S. 408, 411-12 (1964) (holding such injunctions illegal, but noting a possible exception for cases in rem). The law concerning state attempts to enjoin proceedings in other states is still unsettled, but clearly involves more than just a duplication of parties and issues. See generally *Baker v. General Motors Corp.*, 118 S. Ct. 657, 664-65 n.9 (1998) (listing authorities and discussing the involvement of full faith and credit and res judicata concerns in this type of injunction). Even federal court antisuit injunctions against other federal courts are normally based upon a "forbearance" standard, although this varies somewhat according to the Federal Rules of Civil Procedure. See *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922) (noting that when a federal court enjoins the prosecution of a suit in another federal court, principles of comity require that courts of coordinate jurisdiction exercise "forbearance" by "avoiding interference with the process of each other" (quoting *Covell v. Heyman*, 111 U.S. 176, 182 (1884))); see also *infra* notes 93-94 and accompanying text (establishing compulsory counterclaims under Rule 13(a) in order to prevent a multiplicity of suits).



will be allowed to go forward unless there is some special reason why they should not.<sup>91</sup>

Perhaps the closest domestic analog to the "duplication of parties and issues" standard can be found in the analyses of the federal courts when invoking Federal Rule of Civil Procedure 13(a). This comparison is further strengthened because, ironically, many of the antisuit injunctions issued against foreign courts are issued pursuant to this domestic rule of procedure.<sup>92</sup>

Federal Rule of Civil Procedure 13(a) establishes a set of "compulsory" counterclaims that must be brought in the original federal action or not at all.<sup>93</sup> The justifications for compulsory counterclaims are normally couched in terms of promoting judicial economy or convenience.<sup>94</sup> The Supreme Court has defined the purpose of Rule 13(a) as: "[T]o prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising

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<sup>91</sup> See *Robinson v. Jardine Ins. Brokers Int'l Ltd.*, 856 F. Supp. 554, 560 (N.D. Cal. 1994) ("Where judgment is sought in personam, two courts with concurrent jurisdiction may proceed with litigation at least until judgment is obtained in one case which may be used as res judicata in the other. This principle applies even where one action is foreign." (citations omitted)).

<sup>92</sup> See, e.g., *Kaepa*, 76 F.3d at 628 n.14 (deciding the case on other grounds, but noting that its holding was "consistent with the purpose of Rule 13"); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981) (agreeing with the district court that "the policies animating Rule 13(a) and the rationale of the cases upholding injunctions against subsequently-filed federal court actions applied with equal force to this case where the compulsory counterclaim was brought in the courts of Canada"); *Butte Mining PLC v. Smith*, No. 92-36890, 1994 U.S. App. LEXIS 12331, at \*5 (9th Cir. May 17, 1994) (following *Seattle Totems* in stating that "[u]nder the law of this circuit, where a party seeks to litigate a compulsory counterclaim in a foreign country, . . . the district court has the discretion to enter an injunction against the foreign proceeding").

<sup>93</sup> The text of Rule 13(a) reads as follows:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

FED. R. CIV. P. 13(a). The language of this section has been altered very little since its introduction 60 years ago. Compare FED. R. CIV. P. 13(a), with FED. R. CIV. P. 13(a) (1938) (amended 1948).

<sup>94</sup> See 6 WRIGHT ET AL., *supra* note 13, at § 1409, at 48 (stating that "Rule 13(a) is designed to foster the strong federal policy of promoting judicial efficiency"). See generally JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 350 (1985) (discussing the competing policies of adjudicating all legal disputes between two parties in one action on the one hand, and "preventing lawsuits from becoming unduly complicated" on the other).

out of common matters.”<sup>95</sup> Occasionally, concern for protecting parties from vexatious litigation is also expressed.<sup>96</sup> It is also generally easier and cheaper for parties to have all of their claims heard at once. Thus, the compulsory counterclaim rule may be invoked to limit the ability of one of the litigants to harass the others by bringing related suits which create “unnecessary delay, substantial inconvenience and expense.”<sup>97</sup>

Given what must be assumed to be the shared interests of the federal courts in the efficient management of the federal court system, the discretionary standard for the issuance of an antisuit injunction between two federal courts in this situation seems warranted. The extension of such a lax standard into the international setting, however, seems extremely inappropriate given the divergent interests of federal and foreign courts. The justification for ignoring comity under a discretionary standard rests on the assumption that both courts involved share common interests in the case.<sup>98</sup>

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<sup>95</sup> *Southern Constr. Co. v. Pickard*, 371 U.S. 57, 60 (1962); see also *FRIEDENTHAL ET AL.*, *supra* note 94, at 350 (noting that one of the policies of compulsory counterclaims is “the desire to adjudicate all legal disputes between two parties in one action”); 6 *WRIGHT ET AL.*, *supra* note 13, at § 1409, at 46 (noting that the point of the compulsory counterclaim rule is to “avoid[] a wasteful multiplicity of litigation”).

<sup>96</sup> See *FRIEDENTHAL ET AL.*, *supra* note 94, at 188 (noting that “[t]he ease of instituting proceedings under the broad bases of jurisdiction that currently exist” makes litigants vulnerable to vexatious litigation).

<sup>97</sup> *Butte Mining*, 1994 U.S. App. LEXIS 12331, at \*5 (noting that in the Ninth Circuit, the district court has the discretion to enter an injunction against another proceeding when a party seeks to assert a compulsory counterclaim in a foreign jurisdiction which may inconvenience the opposing party); see also *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1353 (6th Cir. 1992) (noting that some “courts rely primarily upon considerations of vexatiousness or oppressiveness” when considering these actions).

<sup>98</sup> This is so even ignoring those cases that choose to apply a domestic rule of court procedure against a foreign court, such as when courts use Rule 13(a) to justify issuing an injunction against a foreign court. See *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981) (affirming the district court’s injunction under Rule 13(a) against a Canadian action where “the validity of the . . . agreements will be a central issue in both the Canadian and American litigations”). It is particularly difficult to see how a rule like Rule 13(a), which is designed primarily to promote efficiency within the federal judicial system, could be used to justify denying an entirely separate judicial system the right to hear a case. Simply put, if the foreign tribunal does not mind wasting its resources on a duplicative case, why should the federal court interfere? Whether the foreign court hears such a case or not has little effect on the federal court proceedings. The case will still go forward, and any holding from such a case will not result in a complete *res judicata* bar on the federal proceeding, because the subject of the foreign court’s case is merely a compulsory counterclaim issue. Instead the foreign decision will, at most, bar litigation of only some issues through collateral estoppel.

In addition, although *res judicata* and collateral estoppel may apply to cases heard in foreign courts if the foreign forum is adequate, courts “do not, with any degree of predictability, grant *res judicata* effect to other nations’ judicial judgments.” Julie E. Dowler, Note, *Forging Finality: Searching for a Solution to the International Double-Suit Dilemma*, 4 *DUKE J. COMP. & INT’L L.* 363, 368 (1994). Thus, perhaps the most important consequence of allow-

Although such an assumption seems warranted where two federal courts are proceeding under a shared rule of procedure such as Rule 13(a), it is difficult to justify in cases involving the courts of two separate sovereigns.

Ignoring the differing interests of a foreign tribunal overlooks the lessons learned centuries ago in England about the disruptive effect of antisuit injunctions.<sup>99</sup> Further, judicial strife at the international level may be even more disruptive than the domestic strife in England during the early years of the Court of Chancery, because, internationally, there is no final arbitrator to resolve conflicts among the various sovereign courts. Thus, in the infamous case of *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,<sup>100</sup> the vigorous pursuit of antisuit injunctions and anti-antisuit injunctions<sup>101</sup> of English and American courts eventually created a gridlock that not only denied potential relief to the plaintiff, but also necessitated the intervention of the English Executive Branch and the House of Lords.<sup>102</sup>

By treating foreign tribunals as if they were merely fellow domestic federal courts rather than the courts of a separate sovereign, these circuits do not seem to acknowledge the similarity between foreign courts and another set of domestic courts from separate sovereignties—the state courts. The state courts, of course, are protected within our federal system by the blanket prohibition of the AIA, subject only to the three specific exceptions discussed previously.<sup>103</sup> It seems logical that foreign courts, themselves part of an international legal community full of overlapping sovereign legal systems, should be accorded a similar level of respect.

## 2. The Stricter Standard

The Second, Third, Sixth, and D.C. Circuits' standard, which allows the issuance of antisuit injunctions only to either protect the forum's jurisdiction

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ing a foreign action to proceed until judgment is the effect that a foreign declaration of nonliability may have on a judgment eventually rendered by a U.S. court. See *id.* at 372 (giving examples of cases in which U.S. judgments have been effectively useless abroad where a foreign court has already issued a judgment of nonliability). If the defendant is able to gain a negative declaratory judgment in the country where his assets are, then the "United States plaintiff's judgment is worthless." *Id.* at 369.

<sup>99</sup> See *supra* Part I.A (discussing the early history of the antisuit injunction).

<sup>100</sup> 731 F.2d 909 (D.C. Cir. 1984).

<sup>101</sup> An "anti-antisuit injunction" is a defensive device used to prevent another court from issuing an antisuit injunction against the issuing court. See Schimek, *supra* note 20, at 501 (describing how an anti-antisuit injunction typically proceeds).

<sup>102</sup> See *id.* at 507 (describing the *Laker Airways* case as an "international incident"); Dowler, *supra* note 98, at 378 (noting that "all notions of international comity were ignored").

<sup>103</sup> See 28 U.S.C. § 2283 (1994) ("A court . . . may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

or prevent evasion of the forum's important public policies, seems to be a better, but also flawed, approach.<sup>104</sup> The issue is not that this standard is too lax, but that it may be too strict.

In essence, these circuits lay down a flat prohibition against antisuit injunctions in the international setting except in the aforementioned two circumstances. Thus, the approach by this group of circuits seems to be analogous to the approach taken by the AIA toward the granting of federal injunctions against the state courts.<sup>105</sup>

In fact, the first exception to the international prohibition created by this group of circuits seems closely related to, if not functionally identical to, the second exception to the AIA.<sup>106</sup> The international exception, however, may actually be a bit broader than the exception in the AIA. Both exceptions contemplate primary application to cases in rem, where actual possession of the property in dispute is necessary to render justice effectively.<sup>107</sup> The international exception, however, also has an additional application to in personam proceedings "if a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action."<sup>108</sup> No such extension of the second exception to the AIA is generally recognized.

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<sup>104</sup> See, e.g., *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (summarizing the standard employed by these circuits).

<sup>105</sup> Compare 28 U.S.C. § 2283 (noting especially the three enumerated exceptions to the AIA), with *Gau Shan*, 956 F.2d at 1353-54 (summarizing the standard used by the Second and D.C. Circuits at the time, and since joined by the Third and Sixth Circuits).

<sup>106</sup> Compare the international test explained in *Gau Shan* ("to protect the forum court's jurisdiction"), 956 F.2d at 1353, with the second exception to the AIA ("where necessary in aid of its jurisdiction"), 28 U.S.C. § 2283.

<sup>107</sup> See *Gau Shan*, 956 F.2d at 1356 ("Where jurisdiction is based on the presence of property within the court's jurisdictional boundaries, a concurrent proceeding in a foreign jurisdiction poses the danger that the foreign court will order the transfer of the property out of the jurisdictional boundaries of the first court."); 17 MOORE ET AL., *supra* note 52, § 121.07[1] (describing the applications of the second exception to the AIA and noting that in rem actions are the only established use of the exception).

<sup>108</sup> *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (noting a second circumstance under which application of the "protect the forum's jurisdiction" exception to the stricter international standard should be applied). The court in *China Trade* was specifically referring to the actions of the district court in *Laker Airways* after it became obvious that the antisuit injunctions issued by the English court in that case would effectively remove the district court's jurisdiction to hear the case. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 933-34 (D.C. Cir. 1984). Upon hearing that one defendant had been granted an antisuit injunction by an English court, the *Laker Airways* court issued its own antisuit injunctions against the remaining defendants to prevent them from following a similar strategy. See *id.* at 917-21.

A possible explanation for this distinction is that such situations have traditionally been covered by the AIA's first exception.<sup>109</sup>

The second exception to the international standard adopted by the Second, Third, Sixth, and D.C. Circuits, "to prevent evasion of the forum's important public policies,"<sup>110</sup> is less easy to correlate with the AIA.<sup>111</sup> Potentially, this exception might be broad enough to encompass both the first and third exceptions to the AIA.<sup>112</sup> Anything which has been specifically mentioned by "Act of Congress" might well be deemed to be an important public policy. Similarly, protecting or effectuating the judgments of the federal courts may also qualify as an important public policy. It is the vagueness of this exception to the stricter international injunction standard, however, that is problematic. Depending on how "important public policy" is defined, the exception could either spiral out of control, and allow antisuit injunctions for any number of spurious reasons, or it could be interpreted so narrowly that the issuance of an injunction could be almost impossible outside of the "protect the forum's jurisdiction" exception.

Thus, although the stricter standard adopted by these circuits takes an approach similar to that espoused in the AIA by presumptively barring anti-suit injunctions unless one of a very few exceptions applies, and although the AIA and this standard both recognize an exception in aid of the issuing court's jurisdiction, the circuits' adoption of an ill-defined "important public policy" exception leaves the true extent of their bar against international antisuit injunctions unresolved.

### III. USING THE ANTI-INJUNCTION ACT AS A MODEL SOLUTION

While the circuits continue to choose sides in this debate, the world continues to grow more economically interdependent.<sup>113</sup> International businesses need to be able to predict the likely outcome of their actions, and

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<sup>109</sup> See 28 U.S.C. § 2283 (focusing on the first exception: "except as expressly authorized by Act of Congress"); 17 MOORE ET AL., *supra* note 52, §§ 121.06-07 (explaining the interaction of the first two exceptions to the AIA).

<sup>110</sup> *Gau Shan*, 956 F.2d at 1354.

<sup>111</sup> As discussed below, the extent of this broadly worded exception is difficult to determine, and this uncertainty interestingly adds an element of unpredictability to the standard adopted by the Second, Third, Sixth, and D.C. Circuits.

<sup>112</sup> See 28 U.S.C. § 2283 (focusing on the first exception—"except as expressly authorized by Act of Congress," and the third exception—"to protect or effectuate its judgments").

<sup>113</sup> See Alex Y. Seita, *Preface to Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 429 (1997) ("As the twentieth century comes to a close . . . [g]reater numbers of domestic businesses, employees, and consumers have looked to foreign markets, investors and products for economic prosperity as well as economic competition.").

therefore need a stable legal environment.<sup>114</sup> At present, it is impossible to predict how a U.S. district court would rule on a motion for an international antisuit injunction without knowing the exact location of the court. As a result, the fate of domestic and foreign entities involved in disputes that could potentially confer jurisdiction on both U.S. and foreign courts may be determined by an accident of geography. It seems quite arbitrary that the U.S. circuit in which an entity chooses to do business might effectively determine whether or not that entity can maintain a lawsuit in a foreign forum. Under such circumstances, even an ill-conceived rule such as that promulgated by the First, Fifth, Seventh, and Ninth Circuits might be superior to the current state of confusion and contention amongst the courts.<sup>115</sup>

There seems to be a variety of ways to address this problem, several of which have been suggested by other authors. Some of the possibilities include: an international treaty, an amendment to the Federal Rules of Civil Procedure, a Supreme Court decision in the field, allowing the circuits to sort the question out for themselves, and congressional action.<sup>116</sup> Of these options, only two—a Supreme Court decision and congressional action—seem either likely or practical.<sup>117</sup>

Eight of the twelve circuits have now taken sides on this issue, and thus it appears ripe for review by the Supreme Court. With little statutory basis

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<sup>114</sup> See Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097, 1101 (1995) (“[I]n the globalized economy of today, it is necessary to maintain a stable legal order in the world trade.”).

<sup>115</sup> See *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626-27 (5th Cir. 1996) (noting the debate between the circuits over which standard to use, and the importance of international comity).

<sup>116</sup> See e.g., Dowler, *supra* note 98, at 401 (proposing a “multilateral convention on the recognition and enforcement of foreign judgements”); Salava, *supra* note 78, at 269-70 (suggesting an amendment to Federal Rule of Civil Procedure 65—injunctions—to specifically deal with foreign antisuit injunctions).

<sup>117</sup> A universal international treaty, although having the advantage of reciprocity from other nations, seems to be a doubtful enterprise. Getting a large group of nations, many of which have quite distinct legal systems, to agree on a universal set of judicial procedures may not be a realistic option.

Amending the Federal Rules of Civil Procedure for this purpose also seems to be an unlikely solution. First, how much deference to extend to the notion of international comity is more a question of substantive policy than a question of procedure, and may thus fall outside the purview of the Federal Judicial Conference. See 28 U.S.C. § 2072(b) (1994) (forbidding the enactment of rules that “abridge, enlarge or modify any substantive right”); see also Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1683 (1995) (discussing the controversy in the 1970s over whether the rules committee had exceeded its authority in promulgating the Federal Rules of Evidence by abridging substantive rights). Second, with a sharp circuit split and nothing approaching a consensus on the issue amongst the judiciary, it would be difficult to promulgate any sort of meaningful rule.

Finally, as mentioned before, allowing the current conflict amongst the circuits to persist might be the worst option of all.

to rely upon, however, any such review would likely constitute no more than a review of the historical importance of the nebulous notion of comity. Although there is no reason why the Court could not conduct such a review, the "fuzzy" nature of the concept of comity, along with the potential political and foreign policy implications of any such decision, might deter the Court from stepping into the fray absent guidance from Congress.

A more effective answer could be provided by congressional action. Although unilateral action by Congress lacks the reciprocity of a multilateral treaty, a carefully worded statute could protect American interests while still accounting for the importance of international judicial comity. Additionally, Congress has been willing to involve itself occasionally in questions of judicial procedure, especially when those procedures have political implications.<sup>118</sup> Finally, it was Congress that regulated the field of antisuit injunctions between the federal and state courts by enacting the AIA. Therefore, similar action to regulate the use of these injunctions (this time, albeit, between federal and foreign courts) would not be unprecedented.<sup>119</sup>

In either case, whether it be via the Supreme Court or through congressional action, the model which should be used in constructing the new law is the AIA.<sup>120</sup> That statute, addressing relations between federal and state courts, implicates issues similar to those raised in the debate over comity's importance to relations between the federal and foreign courts. Both situations involve the courts of separate sovereigns that, at times, find themselves with overlapping jurisdiction. Furthermore, the AIA was based at least partly on the same notions of comity<sup>121</sup> that would have to underlie any proposed law in the international field.

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<sup>118</sup> See, e.g., Civil Justice Reform Act of 1990, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471-82 (1994)) (requiring each U.S. district court to develop and implement a civil justice expense and delay reduction plan in order to improve case management, reduce litigation costs, and promote efficiency); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101, 109 Stat. 737-49 (codified as amended in scattered sections of 15 U.S.C. (Supp. II 1996)) (setting forth new procedures designed to reduce the amount of abusive private securities class action litigation).

<sup>119</sup> See 28 U.S.C. § 2283 (regulating the use of anti-suit injunctions between federal and state courts). It should be noted that congressional action, whether in the case of the AIA or in the international setting, does not bind the states. Consequently, individual states will continue to have their own standards with which to govern the use of anti-suit injunctions.

<sup>120</sup> See *id.*

<sup>121</sup> See *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 515 (1955) (implying that the AIA was based on principles of comity); 17 MOORE ET AL., *supra* note 52, at § 121.02 ("The Act is based on notions of comity and a need to prevent needless friction between state and federal courts." (footnote omitted)).

The Second, Third, Sixth, and D.C. Circuits have already devised a standard which somewhat resembles that codified in the AIA.<sup>122</sup> In both the standard devised by these circuits and the standard adopted in the AIA, a prohibition against antisuit injunctions is the baseline, subject to a limited number of exceptions. Although the indefinite language of the second exception to their prohibition against antisuit injunctions against foreign courts<sup>123</sup> is problematic, the overall test developed by this group of circuits strikes a similar balance to that struck by the AIA.

Even the position adopted by the First, Fifth, Seventh, and Ninth Circuits, which seems to reject international comity, is not totally irreconcilable with a law based upon the AIA. In *Seattle Totems*, the court attempted to further explain its standard by stating that "foreign litigation may be enjoined when it would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing courts [sic] in rem or quasi in rem jurisdiction; or (4) prejudice other equitable considerations."<sup>124</sup> The third of these categories clearly resembles both the second exception to the AIA and the first exception to the standard employed by the stricter circuits.<sup>125</sup> The first exception listed above is also merely a variant of the second exception to the stricter standard.<sup>126</sup> Of course this exception is open to a tremendous amount of latitude in interpretation, but it is the second and fourth categories identified by the *Seattle Totems* court that are truly problematic. The great amount of indeterminacy and discretion inherent in these two categories open the door, in the Ninth Circuit at least, to foreign antisuit injunctions almost as a matter of right, rather than as a rare exception.

If either the Supreme Court or Congress is to address this issue, it is precisely such indeterminate language, and, consequently, such broad grants

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<sup>122</sup> Compare 28 U.S.C. § 2283 (the AIA as amended in 1948), with *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) (summarizing the standard used by this group of circuits).

<sup>123</sup> See *Gau Shan*, 956 F.2d at 1354 (noting that "to prevent evasion of the forum's important public policies" is one of only two proper grounds upon which "to grant a foreign antisuit injunction").

<sup>124</sup> *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981).

<sup>125</sup> Compare *id.* at 855 (stating that foreign litigation may be enjoined when it would "threaten the issuing courts [sic] in rem or quasi in rem jurisdiction"), with 28 U.S.C. § 2283 (stating that a federal court may stay a state proceeding "where necessary in aid of its jurisdiction"—commonly understood to mean when the case is in rem), and *Gau Shan*, 956 F.2d at 1354 (stating that foreign litigation may be enjoined "to protect the forum's jurisdiction").

<sup>126</sup> Compare *Seattle Totems*, 652 F.2d at 855 (stating that foreign litigation may be enjoined when it would "frustrate a policy of the forum issuing the injunction"), with *Gau Shan*, 956 F.2d at 1354 (stating that an antisuit injunction may be issued to "prevent evasion of the forum's important public policies").



of discretion as those utilized by the Ninth Circuit that must be avoided. The AIA bars the use of antisuit injunctions by federal courts against state courts except when absolutely necessary. Any new standard for the international use of antisuit injunctions, whether announced by the Supreme Court or enacted as law by Congress, should impose a standard similar to that codified in the AIA.

### CONCLUSION

Within the federal system, the tremendous discretion given to the courts in issuing antisuit injunctions invites them to ignore comity and mutual respect in the name of judicial economy. The problems this may cause between various federal courts can perhaps be justified by the benefits conferred upon the federal court system as a whole, and by the assumption that all of the federal courts share a common interest in the system's efficiency. It seems much more difficult, however, to justify enjoining the courts of another sovereign entity which may well have legitimate interests divergent from those of our federal court system.

In the United States, this hesitancy is further supported by the existence of one of the nation's oldest statutes, the Anti-Injunction Act of 1793. This act forbids federal court injunctions against state courts in all but a few narrowly defined circumstances.<sup>127</sup> The concerns raised by the use of domestic and foreign antisuit injunctions are sufficiently similar, and the dictates of comity between the courts of different sovereigns sufficiently powerful, to argue against the unprincipled use of an invasive device such as the antisuit injunction in the international setting as well.

The pronounced split in the views of the various circuits on how to cope with these conflicting interests make this issue ripe for either the Supreme Court or Congress to address in the future. In any case, the sharp circuit split presents the Court, Congress, and any of the circuits who have not yet taken a position, with a clear choice on how much weight comity, as opposed to judicial efficiency, should be given when considering whether to issue an antisuit injunction against another sovereign court.

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<sup>127</sup> See *supra* Part I.B.1-3 (describing the three exceptions to the AIA).

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